

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JULIE M. KRAJACK-MEER

Plaintiff.

No. C06-766Z

V.

MICHAEL J. ASTRUE, Commissioner of
Social Security,

Defendant.

ORDER

This matter comes before the Court on the Report and Recommendation of United States Magistrate Judge Monica J. Benton (the “R&R”), docket no. 13, and the Plaintiff’s Objections thereto, docket no. 14. The Court ADOPTS IN PART and DECLINES TO ADOPT IN PART the findings and recommendations of the R&R, AFFIRMS IN PART and REVERSES IN PART the final decision of the Commissioner of the Social Security Administration (the “Commissioner”), and REMANDS to the agency with instructions for the payment of benefits in accordance with this Order for a period of disability beginning January 1, 2001.

ORDER 1-

1 **I. BACKGROUND**

2 The R&R provides a detailed background that shall not be repeated here. In short,
 3 Plaintiff Julie M. Krajack-Meer filed an application on December 1, 1999 for Disability
 4 Insurance Benefits, alleging disability since June 27, 1998. Plaintiff's case has been up and
 5 down on various appeals since she applied for benefits. This appeal concerns the decision of
 6 ALJ Arthur Joyner, issued April 27, 2005, which constitutes the final decision of the
 7 Commissioner. See generally Tr. 373, 386-403.

8 In step 1 of the disability analysis, the ALJ found that Plaintiff has not engaged in
 9 substantial gainful activity since the alleged onset of disability. Tr. 402. In step 2, the ALJ
 10 found Plaintiff to be suffering from the following "severe" impairments: somatoform
 11 disorder, undifferentiated pain type; chronic right foot stress fracture; affective disorder; and
 12 anxiety-related disorder. Tr. 389, 393, 402. In step 3, he found that her impairments do not
 13 meet or medically equal one of the listed impairments in Appendix 1, Subpart P, Regulation
 14 No. 4. Tr. 402. In step 4, the ALJ described a more limited residual functional capacity for
 15 the period between January 1, 2001 and June 1, 2002, than for the period before January 1,
 16 2001 and after June 1, 2002. Tr. 398-399, 402. In step 5, the ALJ ultimately found Plaintiff
 17 disabled for the period from January 1, 2001, to June 1, 2002. Tr. at 403 ("From January 1,
 18 2001 to June 1, 2002, there were no jobs that the claimant could perform consistent with her
 19 vocational profile during this period, as well as her inability to perform work on a sustained,
 20 continuous basis"). However, the ALJ found Plaintiff not disabled before January 1, 2001,
 21 or after June 1, 2002. Tr. 403 ("... there are a significant number of jobs in the national
 22 economy that she could perform before January 1, 2001 and after June 1, 2002.").

23 The R&R recommends affirming the Commissioner's decision to award benefits for
 24 the period January 1, 2001 to June 1, 2002. Plaintiff submits three objections: (1) the ALJ
 25 failed to properly adjudicate the medical evidence; (2) the ALJ improperly evaluated Ms.

1 Krajack-Meer's residual functional capacity; and (3) the ALJ improperly randomly selected
 2 disability start and stop dates.

3 **II. DISCUSSION**

4 **A. Standard of Review of Commissioner's Findings**

5 The Court must affirm a decision denying benefits if it is supported by substantial
 6 evidence and based upon correct legal standards. Lewis v. Apfel, 236 F.3d 503, 509 (9th
 7 Cir. 2001); 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to
 8 any fact, if supported by substantial evidence, shall be conclusive."). The R&R, at page 3,
 9 discusses this standard of review in more detail.

10 **B. Standard of Review of R&R**

11 Under the rules that guide the Court's review of a magistrate's report and
 12 recommendation and a party's objections thereto, the Court "shall make a de novo
 13 determination of those portions of the report or specified proposed findings or
 14 recommendations to which objection is made." 28 U.S.C. § 636(b)(1); see also FED. R. CIV.
 15 P. 72(b); Holder v. Holder, 392 F.3d 1009, 1022 (9th Cir. 2004). The Court "may accept,
 16 reject, or modify, in whole or in part, the findings or recommendations made by the
 17 magistrate judge." 28 U.S.C. § 636(b)(1).

18 **C. Authority to Remand or Award Benefits**

19 "The court shall have power to enter, upon the pleadings and transcript of the record,
 20 a judgment affirming, modifying, or reversing the decision of the Commissioner of Social
 21 Security, with or without remanding the cause for a rehearing." 42 U.S.C. § 405(g)
 22 (sentence four). The Court "may direct an award of benefits where the record has been fully
 23 developed and where further administrative proceedings would serve no useful purpose."
 24 Smolen v. Chater, 80 F.3d 1273, 1292 (9th Cir. 1996). Remanding for a benefits award is
 25 particularly appropriate "where a claimant has already experienced lengthy, burdensome
 26 litigation." Vertigan v. Halter, 260 F.3d 1044, 1053 (9th Cir. 2001).

1 **D. Objection #1: Medical Evidence**2 **1. Dr. Nguyen**

3 Plaintiff challenges the ALJ's rejection of the opinion of Plaintiff's treating
 4 psychiatrist, Dr. Nguyen, that Plaintiff was not able to work on a sustained basis. As the
 5 ALJ noted, “[t]he claimant's treating physician, Dr. Nguyen, opined in May 2001 . . . that the
 6 claimant is ‘incapable of working on a regular and continuous and sustained basis due to her
 7 [mental] disorders.’” Tr. 398 (quoting 17F/2, Tr. 254). Dr. Nguyen further opined that even
 8 if Plaintiff's “life stressors that involve her family” were to “somehow disappear . . . she
 9 would still not be able to work on a regular and continuous and sustained basis due to
 10 anxiety, panic, depression, poor concentration, feelings of being easily overwhelmed,
 11 agitation and social withdrawal.” Tr. 254. Although the ALJ gave “considerable weight to
 12 [Dr. Nguyen's] opinion,” he also gave “significant weight” to the less favorable assessments
 13 of a non-examining, non-treating physician, Dr. Fisher, who opined in March 2000, and to
 14 the non-treating, examining physician, Dr. Mashburn, who opined in July 2004. Tr. 399.

15 If a treating doctor's opinion is contradicted by another doctor, the Commissioner
 16 may not reject this opinion without providing “specific and legitimate reasons” supported by
 17 substantial evidence in the record for doing so. Lester v. Chater, 81 F.3d 821, 830 (9th Cir.
 18 1996). The R&R points out that the ALJ can meet this burden by setting out a detailed and
 19 thorough summary of the facts and conflicting clinical evidence, stating his interpretation
 20 thereof, and making findings. R&R at 9. The R&R concludes that the ALJ met his burden
 21 because “there is no evidence in the record that Dr. Nguyen conducted any objective testing
 22 of Plaintiff.” Id.

23 The Court disagrees. Dr. Nguyen conducted at least eleven mental status
 24 examinations of Plaintiff, and the R&R acknowledged as much. R&R at 10; Tr. at 312-333,
 25 514-522 (Dr. Nguyen's clinical notes). Plaintiff's Objections contend that a psychiatrist, like
 26 Dr. Nguyen, performs mental status examinations, whereas a psychologist, like Dr.

1 Mashburn, performs psychological testing, and that either form of evaluation constitutes
 2 objective medical evidence. Pl.'s Objections at 4 (citing 20 C.F.R. 404.1527(d)(2)(ii)
 3 (according weight to a source's medical opinion depending on "the kinds and extent of
 4 *examinations and testing* the source has performed . . .") (emphasis added)). Plaintiff is
 5 correct that there is no reason to give Dr. Mashburn's one-time psychological testing greater
 6 weight than Dr. Nguyen's mental status examinations, which were conducted over a five
 7 year period between January 1999 and October 2004. Furthermore, as Plaintiff's Objections
 8 point out, it is not clear that Dr. Mashburn's report, as a whole, conflicts with Dr. Nguyen's
 9 opinions. Pl.'s Objections at 5-6; see also Pl.'s Opening Brief, docket no. 10, at 16 (noting
 10 that Dr. Mashburn's findings that Plaintiff's cognitive functioning and memory were intact
 11 "did not address the depression, somatization, anxiety and affective disorders that Dr.
 12 Nguyen identified, and that the ALJ, in his decision, found were severe."). Dr. Mashburn
 13 also never opines that Plaintiff is able to work on a sustained basis despite her mental
 14 impairments. See Pl.'s Objections at 11; Tr. at 490-495 (the Mashburn report). The ALJ has
 15 failed to meet his burden of setting forth the conflicting evidence. Moreover, it is unclear
 16 whether and how the ALJ's "rejection" of Dr. Nguyen's May 2001 opinion affected his
 17 ultimate findings that she was not disabled before January 1, 2001 and after June 1, 2002.
 18 The Court DECLINES TO ADOPT the R&R's conclusion, at page 12, that "the ALJ
 19 properly rejected Dr. Nguyen's opinion by giving specific and legitimate reasons supported
 20 by substantial evidence in the record." Instead, the Court gives full weight to Dr. Nguyen's
 21 May 2001 opinion.

22 **2. Dr. Carkin**

23 In April 2002, Plaintiff's treating rheumatologist, Dr. Carkin, opined:

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 25 I am a board-certified rheumatologist and have been working with Ms. Meer
 26 for quite some time. She unfortunately suffers from severe fatigue and severe
 long-standing widespread disabling musculoskeletal pain. The best name for
 her pain syndrome is myofascial pain syndrome, (fibromyalgia-like). She has
 had extensive workup for rheumatoid arthritis lupus etc., and her laboratories

1 are negative. This does not mean that she does not have disabling pain and
 2 fatigue. . . . I feel that her myofascial pain is a result of her long-standing
 3 severe depression and anxiety. . . . [S]he is completely disabled from severe
 4 fatigue and musculoskeletal pain. She is unlikely to improve in the foreseeable
 5 future. There are no medications or treatments currently available that are
 6 likely to return her to full functioning so that she will be able to work.

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 8 Tr. 300. The ALJ gave “little weight” to Dr. Carkin’s opinion that Plaintiff is completely
 9 disabled by myofascial pain because: (1) “it is unsupported by the medical evidence,” (2) it
 10 is “reliant on claimant’s subjective complaints,” and (3) “the issue of disability represents
 11 an administrative finding reserved to the Commissioner.” Tr. 397. Two pages prior in the
 12 ALJ’s decision, the ALJ rejected Dr. Carkin’s opinion:

13 [T]here is no objective basis for Dr. Carkin’s opinion, and [Dr. Carkin’s]
 14 assessment constitutes a default diagnosis based on an inability to explain the
 15 claimant’s subjective pain symptoms with objective evidence. Dr. Carkin is
 16 also a rheumatologist, not a psychiatrist or psychologist.

17 Tr. 395.

18 The R&R recommends affirming the ALJ’s decision to give little weight to Dr. Carkin
 19 by pointing out that Dr. Carkin’s laboratory tests were all negative and that Dr. Carkin’s
 20 “assessment of the severity of mental impairments is not related to Dr. Carkin’s
 21 rheumatology specialty.” R&R at 13. First, this is an erroneous characterization of Dr.
 22 Carkin’s opinion, which does not assess the severity of Plaintiff’s mental impairments.
 23 Second, the medical expert, Dr. Gustafson, testified that Dr. Carkin’s clinical experience
 24 would allow him to attribute Plaintiff’s somatoform pain to anxiety and depression. Tr. 570-
 25 575. Indeed, the ALJ’s conclusion that Plaintiff suffers from severe somatoform disorder,
 26 undifferentiated pain type, Tr. 402, seems consistent with Dr. Carkin’s opinion that Plaintiff
 is disabled by myofascial pain. The ALJ has failed to reconcile his finding under step 2 that
 Plaintiff suffers from severe somatoform disorder, undifferentiated pain type, with his
 decision to give little weight to Dr. Carkin. The Court DECLINES TO ADOPT the R&R’s
 recommendation, at page 13, to affirm the ALJ’s giving little weight to Dr. Carkin’s opinion.

1 **E. Objection #2: Residual Functional Capacity**

2 Plaintiff argues that the ALJ improperly evaluated Plaintiff's residual functional
 3 capacity ("RFC") by giving significant weight to Dr. Mashburn's July 2004 opinion despite
 4 Dr. Mashburn's admission that Plaintiff's "major depression" was in "brief remission" at the
 5 time of evaluation. Tr. 493. It is unclear which aspect of the RFC Plaintiff objects to that
 6 would have been connected to Dr. Mashburn's findings. Although the ALJ acknowledged
 7 Dr. Mashburn's Global Assessment of Functioning ("GAF") rating of only 51 in his
 8 summary of Dr. Mashburn's findings, Tr. 393, the ALJ does not appear to rely on this low
 9 GAF score in assessing Plaintiff's RFC later in his decision. See generally Tr. 399-401.

10 Plaintiff also challenges the ALJ's finding that "claimant's current baseline
 11 functioning suggests an ability to persist at chores or tasks that she wants to do, as well as a
 12 willingness to let others do things for her," including "bathing and dressing, running errands,
 13 light housework, volunteering for school projects, and taking vacations." Tr. 395. Plaintiff's
 14 testimony from the hearings on November 2002, Tr. 71, and on January 14, 2005, Tr. 530-
 15 555, provides numerous examples of a more diminished capacity for accomplishing tasks of
 16 daily living than the ALJ assigned to her during the post-June 1, 2002 period in which he
 17 found her not disabled. For example, the ALJ finds that Plaintiff volunteered for school
 18 projects. Tr. 395. While this is a true statement, Plaintiff testified in November 2002 that
 19 she had trouble committing to two hours a week of volunteer activity, Tr. 71, and she
 20 testified in January 2005 that she only volunteered twice a month for forty-five minutes. Tr.
 21 532. This volunteer activity would not support a finding by the ALJ that she has an ability to
 22 work on a sustained basis. Similarly, the ALJ found that Plaintiff could run errands, Tr. 395,
 23 but that does not present the entire picture. Although Plaintiff testified in 2005 that she
 24 typically ran errands in the morning after dropping her children off at school, she also
 25 testified that she had to rest for two to three hours every day after doing the errands. Tr. 533.
 26 The R&R does not discuss Plaintiff's testimony regarding her daily activities and the ALJ's

1 RFC assessment even though the issues were raised in Plaintiff's Opening Brief, at pages 20-
 2 22. The R&R instead focuses on the ALJ's findings related to Plaintiff's credibility. R&R at
 3 16-17. In any case, Plaintiff's November 2002 and January 2005 hearing testimony
 4 regarding her limited activities of daily living are consistent with her assertion that she is
 5 unable to work on a sustained basis. Accordingly, the Court DECLINES TO ADOPT the
 6 R&R's recommendation to affirm the ALJ's RFC assessment, to the extent the assessment
 7 was based on the ALJ's finding that "claimant's current baseline functioning suggests an
 8 ability to persist at chores or tasks that she wants to do."

9 In her Objections regarding the ALJ's RFC assessment, Plaintiff also challenges the
 10 ALJ's finding that Plaintiff's symptoms improved enough to allow her to work before
 11 January 1, 2001 and after June 1, 2002. Pl.'s Objections at 9. That issue is addressed below.

12 **F. Objection #3: Disability Start and Stop Dates**

13 Plaintiff contends that "[t]he ALJ provided no legitimate analysis of his decision to
 14 start and stop Ms. Krajack-Meer's disability for a year and one-half in the middle of this
 15 eight year time period of disability." Pl.'s Objections at 3. The R&R explains that the ALJ
 16 substantiated this period of disability by relying on: (1) Plaintiff's testimony from the "prior"
 17 (April 2001) hearing in which Plaintiff described more severe limitations in her functioning,
 18 (2) testimony from Plaintiff's family members in 2001 that she needed assistance with
 19 dressing, childcare, and household chores, and (3) Dr. Nguyen's letters from early 2001
 20 stating that the claimant's condition had worsened since 1998. Tr. 398; R&R at 19 n.7.

21 The Court finds that this evidence supports a January 1, 2001 start date but fails to
 22 support a June 1, 2002 end date for Plaintiff's disability. First, although the ALJ found that
 23 Plaintiff testified to severe impairments in April 2001, he also found that Plaintiff's hearing
 24 testimony in November 2002 and January 2005 "describes more severe limitations than those
 25 contained in an Activities of Daily Living and Socialization questionnaire completed by the
 26 claimant in December 1999." Tr. 394. Second, the ALJ found that after June 1, 2002, "the

1 severity of claimant's mental and physical impairments decreased as exemplified by changes
2 in her symptoms, including the ability to dress and bathe on a daily basis, engage in volunteer
3 activities at her children's school, attend church 6 times a week, and avoid staying in her
4 bedroom most of the day." Tr. 399. In addition to mischaracterizing some of Plaintiff's
5 testimony, the ALJ has failed provide any medical evidence that would support a finding of a
6 "medical improvement" sufficient to show that Plaintiff was "able to engage in substantial
7 gainful activity" after June 1, 2002. 20 C.F.R. §§ 404.1545(a), 404.1545(b)(1) (defining
8 medical improvement as "any decrease in the medical severity of [Plaintiff's] impairments"
9 that is based on "changes (improvement) in the symptoms, signs and/or laboratory findings
10 associated with [Plaintiff's] impairment(s)"). Indeed, not a single physician or expert
11 testified about any such medical improvement, and none testified that Plaintiff's disability
12 ended on June 1, 2002.

13 Accordingly, the Court ADOPTS the R&R's recommendation to affirm the
14 Commissioner's decision to deny benefits for the period between June 27, 1998 and
15 December 31, 2000, and DECLINES TO ADOPT the R&R's recommendation to affirm the
16 Commissioner's decision to deny benefits after June 1, 2002.

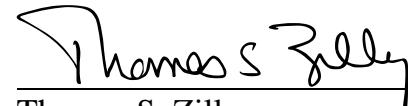
17 **III. CONCLUSION**

18 For the reasons outlined above, the Court ADOPTS IN PART and DECLINES TO
19 ADOPT IN PART the R&R, docket no. 13. The record in this case has been fully developed
20 and further administrative proceedings would serve no useful purpose. The record supports a
21 finding that beginning on January 1, 2001, Plaintiff had no capacity to do any job reasonably
22 available in the national economy. Plaintiff has waited almost eight years for her disability
23 determination and additional proceedings would only delay her receipt of Disability
24 Insurance Benefits. Accordingly, the Court AFFIRMS the Commissioner's decision to deny
25 benefits for the period between June 27, 1998 and December 31, 2000, AFFIRMS the
26 Commissioner's decision to award benefits for the period between January 1, 2001, and June

1 1, 2002, and REVERSES the Commissioner's decision to deny benefits for the period after
2 June 1, 2002. The Court REMANDS to the agency with instructions for the payment of
3 benefits in accordance with this Order for a period of disability beginning January 1, 2001.

4 **IT IS SO ORDERED.**

5 DATED this 13th day of August, 2007.

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8 Thomas S. Zilly
9 United States District Judge

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